QUAH POH KEAT & ORS A

v.

RANJIT SINGH TARAM SINGH

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: W-02-3-2008]
27 APRIL 2009 C

LEGAL PROFESSION: *Discharge of solicitors - Conflict of interest - Disqualification of legal firm from acting as solicitors - Whether two solicitors from firm material witnesses - Existence of material or disputed facts - Legal Profession (Practice and Etiquette) Rules 1978, r. 28(a)* D

CIVIL PROCEDURE: *Solicitor - Discharge of counsel - Conflict of interest - Disqualification of legal firm from acting as solicitors - Whether two solicitors from firm material witnesses - Existence of material or disputed facts - Legal Profession (Practice and Etiquette) Rules 1978, r. 28(a)* E

This was an appeal by the defendants/appellants against the High Court's decision allowing an application by the plaintiff/respondent to disqualify the legal firm of M/s Lee Hishamuddin Allen & Gledhill ('firm') from acting for the appellants in this action. The F respondent was a partner in a firm known as KPMG, with 27 appellants being individuals who were profit sharing partners; the 28th appellant was a private limited company. Prior to this, the respondent had instituted an action against the appellants for unlawfully and illegally excluding him from the partnership of G KPMG pursuant to allegations of sexual misconduct and rape made by one female employee of the appellants against him. The respondent contended that two solicitors from the firm had been actively involved in the respondent's fate, the first being one Lim Heng Seng who was supposed to have sat through the appellants' H Executive Committee meeting where the allegations of misconduct were aired against the respondent and the second being one Datuk Naban, who told the respondent to pack his bags and leave the partnership. The respondent thus alleged that since the two solicitors from the firm were material witnesses in the suit, a I conflict of interest arose that should disqualify the firm from acting as solicitors for the appellants.

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) It would be unlikely that Datuk Naban would suggest to the respondent to "pack his bags and go" if the conclusion of the meeting had not been consonant with his or the firm's legal views. If he had held a differing view, it was more than likely that the unpleasant duty of transmitting the bad news would have fallen on a KPMG official or some other person. By all accounts, this finding of guilt of the respondent of gross misconduct, followed by the instruction to "pack his bags and go", were material issues as there was total denial of the charges by the respondent. With the demands of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 having been completely complied with, in particular the existence of the statutory requirements of material or disputed facts, any reasonable man armed with those facts would anticipate the calling of those two solicitors as witnesses. Thus, the High Court judge's ruling had eliminated any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised. (paras 18 & 19)

Bahasa Malaysia *Translation Of Headnotes*

Ini ialah rayuan oleh defendan-defendan/perayu-perayu terhadap keputusan Mahkamah Tinggi membenarkan suatu permohonan oleh plaintif/responden untuk menyingkirkan firma guaman M/s Lee Hisahmuddin Allen & Gledhill ('firma') dari bertindak bagi pihak perayu dalam tindakan ini. Responden ialah seorang pekongsi dalam sebuah firma yang dikenali sebagai KPMG, dengan 27 perayu-perayu yang merupakan individu-individu pekongsi perkongsian untung; perayu ke-28 ialah sebuah syarikat sendirian berhad. Sebelum ini, responden telah memulakan sesuatu tindakan terhadap perayu-perayu kerana mengecualikan beliau daripada perkongsian KPMG secara menyalahi undang-undang kerana pengataan-pengataan salah laku seksual dan rogol yang dibuat oleh seorang pekerja wanita perayu-perayu terhadapnya. Responden mendakwa bahawa dua peguamcara telah libat secara aktif dalam nasib responden, yang pertamanya seorang yang bernama Lim

Heng Seng yang dikatakan telah menghadiri mesyuarat Jawatankuasa Eksekutif perayu-perayu di mana pengataan-pengataan salah laku itu telah dibuat terhadap responden dan yang kedua seorang yang bernama Datuk Naban, yang telah memberitahu responden untuk kemas begnya dan tinggal perkongsian itu. Responden, oleh itu, berkata bahawa oleh kerana kedua-dua peguamcara dari firma merupakan saksi yang material dalam guaman ini, terdapat suatu percanggahan kepentingan yang bangkit yang seharusnya menyingkirkan firma dari bertindak sebagai peguamcara perayu-perayu.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Ia tidak mungkin bahawa Datuk Naban akan mencadangkan kepada responden untuk "mengemas begnya dan pergi" jika kesimpulan mesyuarat itu tidak sejajar dengan pandangan guamannya atau firma. Jika beliau mempunyai pandangan yang berbeza, ia adalah lebih mungkin bahawa tugas yang tidak menyenangkan itu akan terjatuh kepada seorang pegawai KPMG atau orang lain. Mengikut kata orang, dapatan bahawa responden bersalah atas salah laku melampau, diikuti dengan arahan untuk "mengemas begnya dan pergi", ialah isu-isu material sebab ada penafian sepenuh tuduhan-tuduhan itu oleh responden. Dengan keperluan k. 28(a) Kaedah-kaedah Profesion Undang-undang (Amalan dan Etika) 1978 telah dipatuhi, terutamanya kewujudan keperluan statutori fakta-fakta material atau yang dipertikaikan, mana-mana orang yang munasabah yang mempunyai fakta-fakta sebegitu akan menjangka kedua-dua peguamcara itu akan dipanggil sebagai saksi. Oleh itu, perintah hakim Mahkamah Tinggi itu telah menyisihkan apa-apa konflik kepentingan yang mungkin berbangkit pada pihak peguamcara dan secara serentak memastikan bahawa kepentingan pihak-pihak dalam pertikaian ini tidak dijejaskan.

Case(s) referred to:

Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54 ***(refd)***

PP v. N Vengadasalam & Ors [1990] 1 CLJ 810; [1990] 2 CLJ 893 HC ***(refd)***

Re a firm of Solicitors [1992] 1 All ER 353 ***(refd)***

Re Kumaraendran, An Advocate & Solicitor [1975] 2 MLJ 45 ***(refd)***

Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 CLJ 754 HC ***(refd)***

Wee Choo Keong v. Pendakwa Raya [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 42, 57, 77, 94(3)(n), (o)

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5(a), (b), 27, 28(a), 29

For the appellants - Raja Aziz Addrus (Sean Yeow with him); M/s Lee Hishamuddin Allen & Gledhill

For the respondent - G Naidu (James Culaz with him); M/s Culaz & Assoc

[Appeal from High Court, Kuala Lumpur; Writ of Summons No: S2-22-862-2006]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appeal before us was dismissed with costs, followed by the consequential orders that the order of the High Court be affirmed, and the deposit ordered towards account of taxed costs.

[2] We now state the background and facts of the case. This was an appeal by the defendants (hereinafter referred to as the appellants) against the High Court's decision in allowing the plaintiff's (hereinafter referred to as the respondent) application to disqualify M/s Lee Hishamuddin Allen & Gledhill (the 'firm') from acting for the appellants in this action. The respondent was a partner in a firm known as KPMG, with 27 appellants being individuals who were profit sharing partners. The 28th appellant was a private limited company and a wholly owned subsidiary of PSP Nominee Sdn. Bhd.

[3] Prior to this, the respondent had instituted an action against the appellants for unlawfully and illegally excluding him from the partnership of KPMG, pursuant to an allegation of sexual misconduct and rape made by one female employee of the appellants against him. The respondent had contended that:

- the procedures, acts and conduct undertaken by the appellants in removing him from the partnership was unlawful and illegal;

- the firm had been fully involved in all processes leading to his exclusion. Evidentially one Mr Lim Heng Seng, a solicitor of the firm, was present during the appellants' Executive Committee (EXCO) meeting where the allegations of misconduct were aired against him whereupon the respondent was asked to respond. In fact the respondent had asserted that the said solicitor had chaired the meeting. The EXCO subsequently made a decision of the respondent's position in KPMG;

- the respondent was instructed by the third appellant to meet one Datuk Naban, a senior partner of the firm who had asked him to leave KPMG in no uncertain terms (the words were "pack your bag and leave");

- these acts showed that KPMG and Datuk Naban had clearly formed their stand or opinion as to the allegations made against the respondent even before an inquiry had been commenced against him;

- the solicitors from the firm were not independent and were in breach of their duty to court as well as to their client and would defend their actions or advice; and

- by their involvement the solicitors from the firm were material witnesses in the suit, thus raising the spectre of conflict of interest in the circumstances of the case. That being so the firm of Messrs Lee Hishamuddin Allen & Gladhill should be disqualified from acting as solicitors for the appellants.

[4] The appellants canvassed that:

– mere allegation that the named solicitors in the firm would be called as witnesses was not by itself sufficient for disqualification;

– the firm had never advised or acted for the respondent and thus r. 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') was inapplicable. This rule provides that:

> **5. No advocate and solicitor to accept brief if difficult to maintain professional independence.**
>
> (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.
>
> (b)(i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.
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> (ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

– the affidavits showed that the respondent's association with Datuk Naban and the firm was strictly on a professional basis. The nature of the cordial, close working relationship between respondent and Datuk Naban or with the firm did not fall within the context of r. 5(a) and (b) of the Rules;

– the opinion of Datuk Naban or the firm was completely irrelevant. The sole issue was whether the respondent was wrongfully excluded from the partnership of KPMG;

– at all material times the firm acted as solicitors for KPMG and not the respondent. The latter was never a client of the firm.

[5] At the end of the hearing the learned judge found that r. 5(a) of the Rules was inapplicable in this case and concluded that it was reasonable to presume that the appellants' action

against the respondent reflected the advice given to them by the firm. She also found that the facts, upon which the action was founded apart from being material, were also disputed. It was undeniable that the respondent had claimed that the allegations were baseless.

[6] To have an indepth appreciation of the learned judge's eventual decision, a perusal of some of her comments would be of great assistance, especially facts that would highlight the nexus of the firm, through their solicitors, with the contesting parties. We reproduce some of them:

> With regard to rule 28(a) the defendants do not deny the involvement of Mr. Lim Heng Seng in the EXCO meeting (see enclosure 7 para 4). Neither do they deny the meeting between the plaintiff and Datuk Naban. What Datuk Naban told the plaintiff is not disputed (see para 3.8 of defendant's written submissions marked 'B')
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> ...
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> ...
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> It is not denied that LH-AG advised the defendants (see defendants' written submissions marked 'B' at para 3.3 and 3.4).
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> ...
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> ...
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> It is also reasonable to presume that the defendants' action against the plaintiff reflects the advice given to them by LH-AG. The facts upon which action was taken against the plaintiff by the defendants are material facts and these are disputed facts.

[7] With the summons-in-chambers failing to indicate any specific law or provision by which the court could react accordingly and mete down the required order, it was no surprise that parties went around blindly traversing from one provision to the other of the Rules. Much of the submissions rotated on rr. 3, 4, 5, 27, 28 and 29. It was only in the supporting affidavit that the respondent had hinted the premise of the application though not the provision. The respondent affirmed that the firm would be in a difficult situation to maintain its professional independence and would be put in a potentially embarrassing situation on the basis of conflict of interest. In the interest of justice the firm should be disqualified from acting for the appellants.

[8] It was obvious from the totality of all the above observations that the learned judge had found, especially by the very advice of requesting the respondent to leave KPMG, Datuk Naban had made known his stance as to the allegations made, and the respondent's position in KPMG. That being so r. 28(a) of the Rules is highly relevant and applicable, hence applicable in the current application. With such a personal involvement the likelihood of him being called as a witness of material and disputed facts was very probable. His proximity and relationship with KPMG would invariably invite some conflict of interest. Based on these pointers, the learned judge had held the view that it had jurisdiction to take appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial. The learned judge eventually had transcended on r. 28(a) of the Rules and meted down 'order in terms'.

[9] Before us parties being wiser, especially the respondent, had focused much of their attention only on the abovementioned r. 28(a) of the Rules thus saving much court's time. Risking a repeat of the facts, in a gist, learned counsel for the appellants had ventilated that the advice given by the firm to KPMG with respect to the allegations was privileged from disclosure. Further, even though Mr Lim Heng Seng was present at the EXCO meeting and Datuk Naban had given advice to the respondent in his capacity as a solicitor of KPMG, they were not witnesses of material or disputed facts. Needless to say the respondent contradicted every facet of the appellants' denial and view. Since the firm had been involved in all the processes leading to the Executive Committee (EXCO)'s decision against him, culminating in the 'pack your bag and go' episode, the firm thus was not independent. By their involvement, the solicitors from the firm were potential material witnesses in the suit and had to be disqualified from acting as solicitors for the appellants.

[10] Taking a step backward it is necessary that we give a brief overview of the legal profession in Malaysia, a body that is governed by the Legal Profession Act 1976 ('LPA 1976'), which applies throughout Malaysia except Sabah and Sarawak. In a sense it is a regulatory Act. Under s. 42 of the LPA 1976 is legislated the objects and powers of the Malaysian Bar managed by the Bar Council. The latter body has extensive powers under s. 57 of the LPA 1976.

[11] To regulate the conduct of members, in light of increased membership the Rules were formulated pursuant to s. 77 of the LPA 1976. This provision empowers the Bar Council to make rules regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. Even though, as a general rule, an advocate and solicitor must act for every person there are exceptions to the rule, amongst them, a brief that would embarrass him or that he has a personal relationship with a party or a witness of a proceeding. Apart from the latter situation, under r. 28(a) of the Rules, as identified by the learned judge, an advocate and solicitor shall not appear in a case if he has reason to believe that he will be a witness in respect of material and disputed questions of fact. This provision reads as follows:

> **28. Advocate and solicitor not to appear in a case where he is a witness.**
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> (a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.
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> (b) ...
>
> (c) ...

[12] As gauged from the above provision, in the first part of the rule where a an advocate and solicitor (especially yet to appear in a case) has reason to believe that he will be a witness in respect of a material and disputed question of fact, he shall not appear in open court or even in chambers. In the second part of it, if he already has made an appearance in a case, and it becomes apparent that he will be a witness of a material and disputed question of fact, he shall not continue to appear if he can retire without jeopardising his client's interests.

[13] The highly pertinent question that must necessarily follow in its wake is, why the bar from appearing in such circumstances? The obvious answer, without the need for intensive judicial activism, is that in order to avoid any conflict of interest or embarrassing ethical issues, Parliament found the promulgation of this provision necessary. Imagine a situation where a solicitor might find himself in a sticky situation of being a potential witness in a

A legal tussle, by virtue of his previous professional duties. He is supposed to be at the forefront to plead justice fearlessly, when representing the cause of his client, yet with such an inhibition being present he might not do justice to his client (*Re Kumaraendran, An Advocate & Solicitor* [1975] 2 MLJ 45; *Janeb's*
B *Key to Criminal Procedure Evidence Advocacy and Professional Ethics* by Hamid Sultan bin Abu Backer). At first blush, this provision leaves it to the good sense of the solicitor to decide whether he will be called as a witness, in respect of a material and disputed question of fact and refrain from representing a client. Despite that
C statement we are of the view that a judge pursuant to his inherent jurisdiction has the power to disqualify him if all the statutory preconditions have been complied with (*Public Prosecutor v. N. Vengadasalam & 2 Ors* [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893). Surely to avoid unnecessary problems prevention is better
D than cure in that, in such a scenario, an advocate and solicitor must be restrained at the outset.

[14] In *Abdul Halim bin Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54, Kang Hwee Gee J had occasion
E to state that if a solicitor has reason to believe that he could be a witness in a matter he should not then appear in that matter. Wan Yahya J in *Wee Choo Keong v. Pendakwa Raya* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 opined that r. 28(a) of the Rules did not envisage *ipso facto* that an advocate and solicitor is
F disqualified from appearing in court if called as a witness. For a restriction to arise there must arise first the likelihood of him being called as a witness of any material or disputed facts. In *Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754, Abdul Malik Ishak J abhorred a counsel or his
G legal assistant from appearing in chambers or in open court when he would be a witness later hence contravening s. 94(3)(n) and (o) of the LPA 1976.

[15] In the current case, two solicitors from the same firm were
H alleged to have been actively involved in the fate of the respondent, the first being one Mr. Lim Heng Seng who was supposed to have sat through the meeting whilst the other, one Datuk Naban, who told the respondent to pack his bags and leave the partnership. It was inevitable that both parties disputed much
I of the material facts. To begin with the respondent had denied the gross misconduct allegations made against him. The appellants

on the other hand denied Mr. Lim Heng Seng had chaired the EXCO meeting. As regards the meeting between the respondent and Datuk Naban, which led to the utterances being made, the appellants had ventilated that there was no cause of concern as they anticipated no conflict of interest to the firm, let alone he never was a material witnesses. In fact the appellants have even alleged that what was said or whether it was said at all was wholly irrelevant; their opinions were dimly held.

[16] It was our view that to disqualify the firm from representing the appellants, a strong case has to be established first by the respondent, with the evidence to be gauged from the supporting affidavits. What is strong will depend on the evidence and requirement of the law. In *Johnson and another, Assignees of Colchester v. Marriot (Court of Exchequer of Pleas)* 1833 p. 40 the defendant had wanted to employ one Mr. Jay as his attorney though he was previously the plaintiffs' solicitor. The plaintiffs wishing to prevent him from defending the defendant, for fear of him revealing confidential communication that had passed between them in the course of the previous relationship, had filed an application to restrain him from acting as the defendant's attorney. With no affidavits forthcoming from the plaintiffs (assignees), which could divulge any confidential communication having passed between them, the court refused to grant the order of restrain, on account of the evidence not being sufficiently strong. Bayley, B remarked:

> There are one or two cases in which applications of this nature have been considered: one is the case of *Grissell v. Pelo*, in which is said, that an attorney ought to be restrained from acting, where he has obtained information which should not be disclosed; but that a strong case should be made out, to authorize the Court to interfere (emphasis supplied).

[17] Even though the main action is still pending, and this proceeding is not the forum to go into the merits of the case, by the very nature of the application, a need arises for us to sieve and consider some of the evidence. Prior to any conclusion, we had to pose the question whether a reasonable man armed with all the facts, might reasonably anticipate the probability of the two solicitors being called as witnesses (by analogy see *Re a firm of Solicitors* [1992] 1 All ER 353). Even though the latter case dealt with the issue of disqualification of a solicitor from representing a

A client rather than the issue of conflict of interest as admitted by the appellants here, the test and principles are similar. The appellants, a firm of solicitors (the firm) had previously acted for a company called ASM. While acting for the latter the firm had received confidential information from some companies (A&A
B Companies), which were wholly independent of but closely associated with ASM. Thereafter the firm ceased to act for ASM. Later A&A Companies sued the defendants on issues connected to matters when the firm represented ASM. The defendant subsequently instructed the firm to act for him. A&A Companies
C sought an injunction to restrain the firm from acting for the defendant on the ground that the firm had acquired confidential information and knowledge from them previously when the firm was acting for ASM. The judge granted the injunction. The firm appealed contending that they should be prevented from acting for
D the defendant only if it was probable that A&A Companies would be prejudiced. The Court of Appeal dismissed the appeal. It was held that there was no general rule that a firm of solicitors for a former client could never thereafter act for another client against the former client. But a firm of solicitors would not be permitted
E to act for an existing client against a former client if a reasonable man with knowledge of the facts would reasonably anticipate there was a danger that information gained from acting for the former client would be used against him, or there was some degree of likelihood of mischief. That mischief would be that of
F the confidential information imparted by the former client being used for the benefit of the new client. Parker LJ had opined:

> I turn then to the test suggested by Fletcher Moulton LJ, namely that the court will act 'where mischief if rightly anticipated'. Like
G Sir Nicolas Browne-Wilkinson V-C I consider that this, so far as it goes, is a fair expression of what the court has to look for. I say as far as it goes, for it does not cover such matters as the nature of the mischief or by what standard one consider whether mischief was 'rightly anticipated'.
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> H Some help is in my view to be gained from Buckley LJ's test 'whether there may reasonably be anticipated to exist a danger' of breach of the duty not to communicate confidential information. This appears to me to suggest that the proper approach is to consider whether a reasonable man informed of the facts might reasonably anticipate such a danger (emphasis added).

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[18] At the end of the appeal, we held the view that it would be unlikely that Datuk Naban would suggest to the respondent to pack his bags and go, if the conclusion of the meeting had not been in consonant with his or firm's legal views. If he had held a differing view, it was more than likely that the unpleasant duty of transmitting the bad news would have fallen on a KPMG official or some other unfortunate soul. By all account this finding of guilt of the respondent of gross misconduct, and followed by the instruction to pack his bags and go, are material issues, let alone hotly disputed as there was total denial by the respondent of the charges. With the demands of r. 28(a) having been completely complied with, in particular the existence of the statutory requirements of material or disputed facts, we held the view that any reasonable man armed with those facts would anticipate the calling of these two lawyers as witnesses.

[19] This panel concluded that there existed the conditional material and disputed facts, which would entail the necessary calling of the two solicitors as witnesses in relation to those material and disputed facts. Apart from being satisfied that both preconditions existed it was implausible that one member of the firm who had sat through the meeting, and the other a bearer of bad tidings, not be called as witnesses. Anything less would be an unreasonable expectation. Digressing slightly, even though r. 28(a) does not expressly state that any disqualification of an advocate and solicitor is founded on the premise of wanting to avoid any ethical consternation, eg, any conflict of interest, bottom-line that desire is reflected in it. In fact the contesting parties have even acquiesced too to that purpose here. Due to its obviousness, we see no reason to discuss this factor further. The ruling of the learned judge had eliminated any possible conflict of interest surfacing on the part of the solicitors, and had simultaneously ensured that the interests of the contesting parties remained uncompromised.

[20] Based on all the above reasons we dismissed the appeal with costs.